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90-1734

Supreme Court, U.S.
FILED
MAY 1 1991
OFFICE OF THE CLERK

CASE NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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JACKIE D. MALONE,

PETITIONER,

v.

GILMAN PAPER COMPANY,

RESPONDENT.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

JACKIE D. MALONE
Petitioner

3333 Mush Bluff Road
St. Marys, Georgia 31558
Telephone (912) 882-4852

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an employee who is a participant in an employee welfare benefit plan who was forced to resign, resulting in a significantly smaller pension, is entitled to a jury trial to determine if the employer's motivations in forcing the employee to resign were pretextual, and that the true motivating factor was a desire to reduce future pension entitlements?

2. Whether an employee must submit direct evidence establishing that the employer forced the employee to retire before the normal retirement date for the purpose of interfering with the accrual of pension benefits, where the uncontradicted evidence was that the employee had been a valuable employee for many years prior to the time that the employer used pretextual reasons to force early retirement during a time when the employer was terminating pension plans in order to utilize "excess assets" for its own purposes and engaging in other similar conduct evidencing a desire to reduce pension expenses?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit, whose judgment is sought to be reviewed, are (1) Jackie D. Malone, Petition, and Respondent (2) Gilman Paper Company.

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In The

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JACKIE D. MALONE,

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GILMAN PAPER COMPANY,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

TO: THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, JACKIE D. MALONE, prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Eleventh Circuit entered in the above entitled cause on December 12, 1990, and the Order denying the Petition for Rehearing entered on January 31, 1991.

## OPINIONS BELOW

The opinion of the United States Court of Appeals is not published. A copy is included in the appendix at Page A-2. The opinion of the United States District Court for the Southern District of Georgia is unpublished, but a copy is included in the Appendix at Page A-8 through A-14.

## JURISDICTION

The Judgment of the Court of Appeals was entered on December 12, 1990. The Order of that court denying the Petition for Rehearing was entered on January 31, 1991. 28 *U.S.C.* § 1254(1) confers jurisdiction of the Supreme Court of the United States to review the Judgment in question by Writ of Certiorari.

## STATUTORY PROVISIONS INVOLVED

ERISA § 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." 29 USC § 1140 [29 USCS § 1140]

## STATEMENT OF THE CASE

The Petitioner, JACKIE D. MALONE, filed suit in the United States District Court for the Southern District of Georgia, on June 23, 1989. The Petitioner brought suit against the Respondent because the Respondent forced the Petitioner to resign from Petitioner's employment after the Petitioner had worked long enough to attain pension benefits, but prior to the Petitioner's normal retirement age. As a result, the Petitioner's pension benefits were substantially less than that which he would have received had he worked until the normal retirement age.

The Respondent answered the suit and denied liability. Discovery was undertaken. The Respondent made a Motion for Summary Judgment which was granted by the Court on April 6, 1990. From that adverse judgment, the Petitioner is bringing this appeal.

The Petitioner, JACKIE D. MALONE, worked for the Respondent, GILMAN PAPER COMPANY, from August, 1954, until July 1, 1986. On that date, he ceased to be employed by GILMAN PAPER COMPANY because he was essentially forced to retire.

While the Respondent, GILMAN PAPER COMPANY, contends that the Petitioner voluntarily resigned, the Petitioner does not agree with that contention. The Petitioner contends that he was essentially told he could either retire or be terminated. The record in this action discloses that JACKIE D. MALONE was a good employee during the thirty-two years that he was employed by the Respondent. As a part of the total compensation which the Respondent paid to the Petitioner, the Respondent also made contributions to the pension plan which covered the Petitioner and other salaried employees. The plan which the Petitioner was a participant in was terminated by the Respondent. The plan was terminated because it was, according to John Love, "an over funded plan," according to the Respondent. A new plan was created in its place. When the pension fund was terminated, the company purchased annuity contracts for some of the employees. Some employees had the option of "rolling an actuarially equivalent lump sum over into our savings plan." GILMAN PAPER COMPANY ended up with approximately $5,000,000 in "excess funds." When the grocery bag department in St. Marys closed, salaried employees aged 55 and over were given the opportunity to retire early with no reduction in benefits. A similar option was not given to the Petitioner.

If JACKIE D. MALONE had continued to work until age 65, the pension benefits which he would have received would be greater than the benefits that he currently receives.

GILMAN PAPER COMPANY terminated the pension plan in which JACKIE D. MALONE had participated in order to withdraw the funds held in the plan. A GILMAN employee can basically retire at age 62 and receive maximum pension benefits. When the bag plant in St. Marys closed, a number of management employees who had not yet attained 62 years of age were given the option of retiring with no reduction in benefits. When the New York operations were moved to St. Marys, a number of salaried employees who had not attained the age of 62 were given full pension benefits without reduction for early retirement.

The Respondent's President, William Davis, thought that JACKIE D. MALONE was a capable employee.

The Respondent had a legitimate expectation of working until January 5, 1995, at which time he would have received a substantially greater pension. The pension would have been an expense to the Respondent, GILMAN PAPER COMPANY, and by forcing the Petitioner to resign, the Respondent, GILMAN PAPER COMPANY, has saved itself substantial expense.

## REASONS FOR GRANTING THE WRIT

The Petitioner respectfully shows that the Eleventh Circuit Court of Appeals erred in concluding that the Respondent was entitled to summary judgment on the basis that the Respondent had shown that there was no causal link between the Petitioner's retirement and his pension benefits. The Court overlooked the fact that Respondent admitted that Petitioner would have received greater pension benefits than those that he receives if he had continued to work until age sixty-five.

If the Court instead meant to say that there was no evidence establishing a causal link between the Respondent's personnel actions and an intent to interfere with the Plaintiff-Petitioner's attainment of pension benefits, then the Petitioner respectfully submits that the Court has overlooked certain facts of record and has misapplied the law applicable to this action.

The record in this action includes an Affidavit of JACKIE D. MALONE given in opposition to the Respondent's Motion for Summary Judgment. The Petitioner was told that when there were certain changes being made in the department where the Petitioner worked and that he had essentially three choices. He was told that he could take early retirement, which he ultimately

was forced to do. He was also told that he could apply for long term disability, which he did not think was a viable alternative since it would have involved what the Petitioner felt to be an act of fraud upon the insurance company. The Petitioner was also told that he could retrain, but that he would be expected to work twelve to sixteen hours a day, for six or seven days a week, with no days off. The Petitioner was advised that if he were sick or otherwise not able to work, he would be terminated. He was also advised that if he had not successfully retrained in thirty to forty-five days, he would be terminated. When he requested that he be allowed to go back to two former positions that he had previously held, he was advised that the positions were held by younger men who made less money than the Petitioner. Accordingly, the Petitioner was forced to retire.

In light of the fact that the Respondent had terminated a pension plan shortly before the forced retirement of the Petitioner in order that the Respondent could take several million dollars out of said plan to be used for its own purposes, and in light of the fact that the Respondent obviously was attempting to reduce its pension costs, since the lower paid employees would receive smaller pensions, it is respectfully submitted that this created an inference that reducing the Petitioner's future pension benefits,

which resulted in a corresponding cost reduction to the Respondent, was at least one of the motivating factors which caused the Respondent to force the Petitioner into early retirement. Accordingly, it is respectfully submitted that summary judgment was inappropriate. In *Hayden v. First National Bank*, 595 F.2d 994, 996 (5th Circuit 1979), the court held that when dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, the granting of summary judgment is especially questionable. See, also, *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Circuit 1981). There, the court held that it was not part of the plaintiff's burden to prove absence of a legitimate business reason for a challenged practice. The court noted that knowledge of a legitimate business reason is uniquely available to the employer. In the instant case, although the Respondent has contended that it had a valid reason for forcing the Petitioner to retire early, the discharge of the Petitioner was a pretext. Unreasonable demands and conditions were placed on the Petitioner. Accordingly, the Petitioner should be given a trial in order to determine whether the motivations of the Respondent were legitimate, or whether the motivation was to keep the Petitioner from attaining full pension benefits. In

*Ingersoll- Rand v. McClendon*, _____ U.S. _____, 112 L.Ed.2d 474, 110 S.Ct. 1804 (1990), the Court held:

> By its terms § 510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits . . . . We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510.

The decision of the Court of Appeals is in conflict with the decision of the Supreme Court interpreting the purpose of ERISA § 510. The Court of Appeals failed to give proper consideration to the decision of this Court in *Ingersoll-Rand Company v. McClendon,* 498 U.S. _____, 112 L. Ed. 2d 474, 111 S. Ct. (1990). Congress clearly intended to prohibit employers from discharging employees in order to reduce pension rights.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Court should issue a Writ of Certiorari and reverse the decision of the District Court and the Circuit Court of Appeals.

This the 30th day of April, 1991.

Jackie D. Malone

JACKIE D. MALONE
PETITIONER

# APPENDIX

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5. Certificate of Service ..... A-15

Jackie D. Malone filed this action against Gilman Paper Company asserting that the defendant forced him to retire prematurely in order to avoid paying the greater pension benefits to which he would have been entitled had he retired at age 62. This conduct by Gilman paper, Malone argues, violates section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1985) (hereinafter "ERISA"). The district court granted Gilman Paper's motion for summary judgment, holding that an employee whose pension rights are vested at the time of his termination cannot invoke the protection of section 510. Malone appeals, and argues that the district court erred in granting summary judgment.

Gilman Paper contends that the district court correctly concluded that an employee whose pension benefits are vested has no cause of action under section 510. Alternatively, Gilman Paper argues, Malone failed to submit any evidence that Gilman Paper forced him to retire for the purpose of interfering with his pension benefits.

The evidence submitted by the defendant supports their position that there was no causal link between the plaintiff's retirement and his pension benefits. In the fact of that evidence, the burden was cast upon the plaintiff to present evidence to the

contrary. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2510-11 (1980). No contrary evidence having been presented, the defendant was due summary judgment under Fed. R. Civ. P. 56. In light of his holding, we find it unnecessary to decide whether the district court correctly concluded that an employee whose pension benefits are vested cannot invoke the protection of section 510.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 90-8394

---

D. C. Docket No. CV289-096

JACKIE D. MALONE,

Plaintiff-Appellant,

versus

GILMAN PAPER COMPANY,

Defendant-Appellee.

---

Appeal from the United States District Court
for the Southern District of Georgia

---

(December 12, 1990)

Before COX and BIRCH, Circuit Judges, and GIBSON, Senior Circuit Judge.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said

AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered:
For the Court: Miguel J. Cortez, Clerk

By: /s/_____
Deputy Clerk

ISSUED AS MANDATE: FEB 14 1991



BEST AVAILABLE COPY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 90-8394

---

D. C. Docket No. CV289-096

JACKIE D. MALONE,

Plaintiff-Appellant,

versus

GILMAN PAPER COMPANY,

Defendant-Appellee.

---

Appeal from the United States District Court
for the Southern District of Georgia

---

ON PETITION(S) FOR REHEARING

BEFORE: COX and BIRCH, Circuit Judges, and GIBSON*, Senior Circuit Judge.
PER CURIAM:

The petition(s) for rehearing filed by Appellant, Jackie D. Malone is denied.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge
*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

| | | |
|---|---|---|
| JACKIE D. MALONE, | : | CIVIL ACTION |
| Plaintiff | : | |
| V. | : | |
| GILMAN PAPER COMPANY, | : | |
| Defendant | : | NO. 289-96 |

ORDER

Plaintiff brings the instant action claiming that the defendant terminated his employment in violation of § 510 of the Employee Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. § 1140. The case is currently before the Court on the defendant's motion for summary judgment. For reasons expressed below, this motion will be granted.

FACTS

Plaintiff began employment with the accounting department of Gilman Paper Company (hereinafter "Gilman" or "employer") in 1954, and worked in that capacity until retiring on July 1, 1986. Throughout the period of his employment with Gilman, plaintiff was a participant in the "Gilman Paper Company

Pension Plan For Salaried and Clerical Employees." Plaintiff's rights under this plan were fully vested at the time of his retirement, and he is now receiving benefit payments. Since he was only 56 years old at the time of his retirement, however, plaintiff's pension benefits are not as great as the benefits he would have received had he retired at age 62.

Plaintiff denies that he voluntarily elected to enter early retirement. Rather, he claims that Gilman presented him with a "Hobson's choice" of either retiring immediately or facing virtually certain termination. Plaintiff alleges that his employer forced him into premature retirement in order to avoid paying the greater pension benefits to which plaintiff would have been entitled had he retired at age 62.

Gilman claims that it eliminated plaintiff's position in an effort to restructure and trim the accounting department, and claims that it gave plaintiff the option of either retiring or taking an alternative position with the company at a reduced salary. Gilman denies that its actions were motivated by a desire to thwart plaintiff's pension benefits.

DISCUSSION

ERISA § 510 makes it unlawful for an employer to discharge an employee "for the purpose of interfering with the attainment of any right to which such [employee] may become entitled under [a pension] plan . . . ." 29 U.S.C. § 1140. To recover under this section, "plaintiff must show that defendant terminated him with the 'specific intent' to interfere with his rights under defendant's [pension] plan." Baker v. Kaiser Aluminum and Chemical Corp., 608 F.Supp. 1315, 1318 (N.D. Ca. 1984). See also Titsch v. Reliance Group, Inc., 548 F.Supp. 983, 985 (S.D.N.Y. 1982) (same), aff'd without op., 742 F.2d 1441 (2d Cir. 1983). No ERISA cause of action lies where the loss of pension benefits "was a mere consequence of, but not a motivating factor behind" the plaintiff's termination. Titsch, supra, at 985.

In its motion for summary judgment, counsel for Gilman argues only that there is no evidence from which the finder of fact reasonably could conclude that Gilman acted with the specific intent to thwart plaintiff's pension rights. Unfortunately, counsel's brief does not raise the truly dispositive issue presented here; the Court's own research has revealed a long line of cases holding that an employee whose pension rights are vested at the time of his termination cannot invoke the protections of § 510. See, e.g.,

Silverman v. Barbizon School of Modeling & Fashion, Inc., 720 F.Supp. 966, 971 (S.D. Fla. 1989); Kelley v. Chase Manhattan Bank, 717 F.Supp. 227, 232 (S.D.N.Y. 1989); Johnson v. United Airlines, Inc., 680 F.Supp. 1425, 1432-33 (D. Haw. 1987); Corum v. Farm Credit Services, 628 F.Supp. 707, 717-18 (D. Minn. 1986); Donohue v. Custom Management Corp., 634 F.Supp. 1190 (W.D. Pa. 1986); Moehle v. N. L. Industries, Inc., 646 F.Supp. 769, 779 n. 6 (E.D. Mo. 1986), aff'd without op., 845 F.2d 1027 (8th Cir. 1988); Baker v. Kaiser Aluminum and Chemical Corp., 608 F.Supp. 1315, 1319 (N.D. Ca. 1984).

The reasoning of the courts in the Corum and Baker cases is particularly illustrative. In both of these cases, the courts considered -- and rejected -- claims identical to those made by the plaintiff sub judice. The Corum court explained its holding as follows:

> The purpose of [§ 510] was primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." Since plaintiff's pension rights were vested, he cannot maintain that defendant fired him in order to prevent plaintiff from obtaining vested pension rights. . . . Nevertheless, plaintiff argues that defendant violated ERISA because in discharging plaintiff, defendant prevented plaintiff from accruing the additional benefits which are associated with continued employment. In order to recover on his ERISA claim, plaintiff must

establish that defendant discharged him with the specific intent to interfere with plaintiff's rights under defendant's protected benefit plans. Denying a vested employee the opportunity to accrue additional benefits, however, has only an additional effect on plaintiff's right to benefits. Such an impact, moreover, "would result from any discharge." Where the only evidence that an employer specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth sufficient evidence to defeat summary judgment.

Corum, 628 F.Supp. at 717-18 (citations omitted). The Baker court followed similar reasoning in reaching its conclusion:

> Plaintiff does not dispute that his pension rights had vested, but rather asserts that defendant terminated him to prevent him from qualifying for [the larger benefits he would receive if he had retired at age 65]. . . . The only evidence offered by plaintiff is that if he had not been terminated, he would have been able to accrue additional benefits. It is undisputed that no benefits previously earned would have been forfeited by reason of the discharge. Thus, regardless of whether the discharge was arbitrary and capricious, its impact on benefits was only incidental -- the resulting loss was simply that which would result from any discharge, i.e. a loss of wages and other benefits earned on account of work to be performed in the future.

Baker, 608 F.Supp. at 1318-19. Somewhat more succinct, though no less persuasive, is the reasoning of the court in Moehle: "[Plaintiffs] have not alleged facts which would state a claim for relief under [§ 510]. . . . [P]laintiffs were vested and [§ 510] is designed to prevent employers from discharging employees in order to prevent vesting." 646 F.Supp. at 779 n.6.

The Court's research has revealed no cases within the Eleventh Circuit addressing the specific question presented here; it is apparently an issue of first impression in this jurisdiction. Although there is some authority in support of plaintiff's position,[1] the Court is persuaded by both the quantity and the reasoning of the above-cited cases from our sister jurisdictions holding that a vested employee cannot recover under § 510.

This interpretation of the statute is supported by an examination of its legislative history. This legislative history indicates that the intent of Congress in passing § 510 was to prevent employers from arbitrarily discharging employees who are on the eve of obtaining vested pension rights. See, e.g., Remarks of Senator Hartke, 119 Cong. Rec. 30374 (Section 510 is intended to protect those "vulnerable" employees "whose substantial pension potentialities provide an incentive to their discharge before vesting.") (emphasis added). Nothing in the legislative history indicates that Congress intended to require that

[1] See Nemeth v. Clark Equipment Co., 677 F.Supp. 899, 907 (W.D. Mich. 1987) (holding that § 510 "provide[s] a remedy for employees whose pension rights have vested and whose . . . injury is the lost opportunity to accrue additional benefits").

employers retain already-vested employees until such time as their vested benefits reach a maximum level.

CONCLUSION

Accordingly, the Court holds that plaintiff has no cause of action under § 510. Plaintiff's pension rights were vested at the time of his departure from Gilman, and Gilman freely concedes that those vested rights have not been extinguished. Indeed, plaintiff is currently receiving the level of benefits to which he was entitled as of the date of his termination. Plaintiff's termination affected his pension rights only in the most incidental respect; he has been denied the opportunity to accrue the increased pension benefits which are associated with continued employment. As the legislative history and the above cases make clear, this is not an interest protected by the statute. Defendant's motion for summary judgment is, therefore, **GRANTED**. The Clerk of the Court is directed to enter an appropriate judgment.

SO ORDERED, this 6th day of April, 1990.

ANTHONY A. ALAIMO
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day, prior to filing, served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit upon the person indicated below, said person being counsel of record for the Respondent, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Wallace E. Harrell, Esquire
Gilbert, Harrell, Gilbert, Sumerford
& Martin, P.C.
777 Gloucester Street
Post Office Box 190
Brunswick, Georgia 31521-0190

This the 30th day of April, 1991.

Jackie D. Malone

JACKIE D. MALONE
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